Supreme Court, U.S.
FILED

No. 03-17090 05-503 AUG 18 2005
OFFICE OF THE CLERK

In the Supreme Court of the United States

Michael A. Sylver, Petitioner

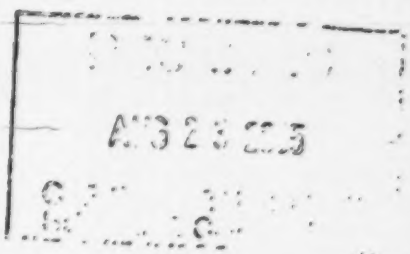
v.

The Securities and Exchange Commission

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATED COURT OF APPEARLS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Joshua M. Landish, Esq.
818 E. Charleston Blvd.
Las Vegas,
NV 89104
(702) 384-8300
Counsel of Record
Thomas R. Port, Esq.
931 Hartz Way, Suite 200
Danville, CA 94526
(925) 855-1910



QUESTION PRESENTED

Whether petitioner was denied procedural and substantive due process by the District Court's refusing to allow him, during direct and cross-examination, to refer, pursuant to Rule 612 of the Federal Rules of Civil Procedure (FRCP), to refer to documents and writings, whether or not admissible in evidence, in order to refresh his recollection of events that took place several years prior to trial.

PARTIES TO THE PROCEEDINGS

Petitioner is Michael A. Sylver.
Respondent is the United States Securities and Exchange Commission.

TABLE OF CONTENTS

PETITION

OPINIONS BELOW

JURISDICTION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOVLED

STATEMENT

CONCLUSION

APPENDIX

TABLE OF AUTHORITIES

STATUTES

28 U.S.C.

28 U.S.C., Section 1332.

Fed. R. Evid. 612

Fed. R. Evid. 803.5

CASES

Advanced Systems, Inc. v. Kent *State University,* 212 F.3d 1272, 1284 (Fed. Cir. 2000).

Annette Rush, v. Illinois Central Railroad Company, 399 F.3d 705; 2005 U.S. App. LEXIS 3624; 2005 Fed App. 0106P (6th Cir. 2004)

Barrer v. Women's National Bank, USDC, Dist Columbia, 96 F.R.D. 202, at 203, 204, 35 Fed. R. Serv.

Jacobson v. Amtrak, USDC, ND IL., Eastern Div., 200 U.S. Dist. LEXIS 20924, at 13, Note 1 (2000).

James Julian, Inc. v. Raytheon Co., USDC, Dist. Del., 93 F.R.D. 138, at 144 (1982).

Marshall v. United States Postal Service, USDC, Dist. Columbia, 88 F.R.D. 348, 30 Fed. R. Serv. 2d 1263 (1980).

M.B., a minor, vs. Women's Christian Alliance, U.S. Dist Ct., Eastern Dist. Penn, 2002 Dist. LEXIS 10105

Suss v. MSX Int'l. Eng'g. Svcs., USDC, SDNY, 212 F.R.D., 159 (2002).

Town of Columbus v. Loren Robert Harrington, 2001 Mont 258, 307 Mont. 215, 36 P.3d 937 2d 1052 (1982).

United States of America v. Donald D. Faulkne , 538 F.2d 724, 1976 U.S. App. Lexis 8102.

United States. v. Lane, 474 438, 106 S. Ct. 725, 832, 833 (1986).

IN THE SUPREME COURT OF THE UNITED STATES

No. 03-17090

MICHAEL A. SYLVER, PETITIONER,

V.

THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Michael A. Sylver, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals was not published. It is set forth verbatim in Appendix A to this Petition. The decision of the District Court was also unpublished.

JURISDICTION

The Judgment of the Court of Appeals was entered on May 20, 2005. There was no petition for rehearing. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1). This matter was before the United States District Court for Nevada based on subject matter jurisdiction. 28 U.S.C., Section 1332.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides for procedural and substantive due process of law; "...no person shall be deprived of life, liberty, or property without due process of law".

Federal Rule of Evidence (FRE) 612 provides:

"Except as otherwise provided in criminal proceedings by section 3500 of title 18 United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either –
(1) while testifying, or
(2) before testifying, if the court in its discretion determines an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to

introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so requires, declaring a mistrial."

Fed. R. Evid. 803.5:
(5) Recorded Recollection)
"A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly If admitted, the memorandum or record may be read into evidence, but may not itself by received as an

exhibit unless offered by an adverse party.

STATEMENT

This case involves the interpretation and application of *Fed. R. Evid.* 612 which allows a witness to refer to writings which may, or may not, themselves be admissible, but which materially assist the witness to refresh his or her recollection. *M.B., a minor, vs. Women's Christian Alliance,* U.S. Dist Ct., Eastern Dist. Penn, 2002 Dist. LEXIS 10105. Such writings are not made inadmissible by the hearsay rule when they are "[a] memorandum or record concerning a matter about which a witness once had knowledge, but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory, and to reflect that knowledge correctly." *Fed. R. Evid.* 803.5.

The District Court case alleged, *inter alia*, that petitioner received, "undisclosed cash and stock" from the public corporation he headed and/or that he failed to provide contemporaneous documentation for various cash withdrawals from corporation's accounts. Throughout petitioner's direct testimony the Commission consistently objected to his referring to receipts and related documents to refresh his recollection in explaining certain cash transactions.

The District Court repeatedly sustained those objections to which defense counsel took exception. The Commission's success in all such motions resulted largely from their repeated claim they would be prejudiced if Sylver were permitted to rely on such documents for testimony, based on their claim they had not had access to them yet these exact documents had been numbered and copied by the Commission years earlier as part of their investigation. (The accounting records of the corporation had been kept on Peachtree accounting system per the testimony of numerous witnesses and both auditors. Those records had been maliciously destroyed by one time corporate bookkeeper Linda McGee who was an adverse person, associated with one Charles Kricfalusi against whom a default judgment was previously obtained.)

As a result of the court's sustaining plaintiff motions to prevent the petitioner to refreshing his recollection by reference to the only documents available to him, petitioner was put in the unfair and highly prejudicial position of trying to explain from memory detailed transactions that had occurred some four to seven years earlier. He was thus denied his only possible defense as to his proper allocation of monies.

As these documents would have enabled Sylver to fully account for the $232,000 of cash and credit card charges the court ordered him to "disgorge" to the